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No. 97-1765

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

OGLEBAY NORTON COMPANY,

Petitioner,

vs.

LOIS E. JENSON, PATRICIA S. KOSMACH, KATHLEEN O'BRIEN ANDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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THE COURT OF APPEALS DID NOT FIND THAT THE TRIAL COURT HAD ABUSED ITS DISCRETION BY REQUIRING THAT OPINION TESTIMONY BE PRESENTED IN THE FORM OF WRITTEN REPORTS

Petitioner has already addressed Respondents' claim that their experts "all described their methodology for determining causation," (Respondent's Brief at 12), that each expert "provided similar foundation" including differential diagnosis, and that this evidence "was ignored by the Special Master." (Respondent's Brief at 13).[1]

But respondents also argue, paradoxically, that the trial court ". . . excluded critical foundation testimony," and that these exclusionary rulings abused the trial court's discretion. (Respondent's Brief at 6). This latter point is not addressed in the Petition, nor was it properly addressed by the Court of Appeals.

As he explained in his Report (App. at 78a), the Special Master directed the parties to prepare and submit written reports which would serve as their experts' direct testimony. At trial, the direct examination of an expert was limited to "clarifying" what was disclosed in his/her report. Requiring that opinion testimony be presented in the form of written reports is within the discretion of the trial court under Evidence Rule 611(a) and Federal Civil Procedure Rules 16 and 26. *See, e.g., In re Adair*, 965 F.2d 777,

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1. This Court's decision in *General Electric Co. v. Joiner*, __ U.S. __, 118 S. Ct. 512 (1997) directs reviewing courts to defer to the discretion of the trial court when determining whether an expert's opinion is founded on "scientific knowledge." In this case, the Court of Appeals ignored the trial court's negative findings as to the scientific validity of respondents' experts' opinions, relying instead on their general qualifications, and the fact that causation opinions by other experts have been received in other mental and emotional injury cases.

779 (9th Cir. 1992); *Saverson v. Levitt*, 162 F.R.D. 407 (D.D.C. 1995).

If pertinent foundation testimony was excluded by any of the rulings referenced in Respondents' Brief (at 10-11), the excluded testimony was outside the scope of the expert's written report.[2] While the Court of Appeal's opinion alludes to these

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2. The testimony of Dr. Novak (App. at 16a-17a, n.11) that was excluded because it was outside the scope of her report included what kind of behavior she looked for to diagnose post-traumatic stress disorder ("PTSD") (Trial Tr. Vol. XXIV at 22-27), whether she had preconceived ideas regarding her findings on causation, and whether plaintiff's PTSD was chronic or acute (*id.* at 46-48), what symptoms of PTSD plaintiff experienced during the time she was working at the mines and whether plaintiff's then current symptoms could have been caused by a rape when plaintiff was 19 years old (*id.* at 52-54), the symptoms that plaintiff displayed that were specifically related to sexual harassment (*id.* at 72-73) and whether Dr. Novak had identified symptoms that were associated with traumatic events of sexual harassment that led to a diagnosis of anxiety disorder (*id.* at 99-100).

The testimony of Dr. Bell (App. at 17a-18a, n. 12), that was excluded as outside her report included testimony as to what events she considered to be contributing to the diagnosis of anxiety disorder, whether she ruled out any other potential contributing factors of the source of the diagnosis, whether an abusive family history had any effect on the condition of the plaintiff (Trial Tr. Vol. XXV at 22-23) whether psychologists are capable of making diagnoses regarding psychological factors affecting physical conditions, whether she had made such a diagnosis in the past (*id.* at 159-60) and the specific events she considered to be contributing factors to her diagnosis of PTSD (*id.* at 63).

The testimony of Dr. Mayberg (App. at 18a-19a, n. 13), that was excluded as outside his report included testimony as to whether physical reactions to harassment are the kind of symptoms he would use in his diagnostic methodology, whether particular symptoms fit into the diagnostic methodology, whether sexual harassment in the workplace is recognized as a "stress" (Trial Tr. Vol. XXII at 19), his conclusions regarding the stresses plaintiff was experiencing and the behavior she was exhibiting, his opinion on plaintiff's prognosis and any other stressors on plaintiff, other than those listed in the expert's report (*id.* at 171-173), whether there was "a relationship between the experiences in the mine of 1984 and the present" and whether plaintiff's physical symptoms were still present (*id.* at 207-209).

exclusionary rulings (App. at 16a-18a, n.11-13); it does not suggest that the trial court abused its discretion by limiting Respondents' to what is disclosed in their experts' written reports. Indeed, the Court of Appeals appears to have been unaware that the Special Master's exclusionary rulings were based on his pretrial order regarding the use of experts' reports.

CONCLUSION

The Court of Appeals' decision regarding admissibility of causation opinions was reached, not by questioning the requirement that the experts' foundation testimony be included in their written reports; but by usurping the trial court's role in evaluating each expert's foundation testimony. If the Special Master's orders controlling the form of the experts' direct testimony in this case warranted separate consideration, this court should summarily reverse and remand for such further consideration.

Respectfully submitted,

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